INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	1
Statute involved	2
Statement	4
Discussion	11
Conclusion	14

CITATIONS

Cases:

Gonzales v. *United States*, No. 69, O. T. 1954 — 13

Sicurella v. *United States*, No. 250, O. T. 1954 — 13

Simmons v. *United States*, No. 251, O. T. 1954 — 13, 14

Tomlinson v. *United States*, No. 391, O. T. 1954 — 11

United States v. *Wilson*, 215 F. 2d 443 — 12

Witmer v. *United States*, No. 164, O. T. 1954 — 13

Statutes:

Universal Military Training and Service Act, 62 Stat. 604, 612, 622; 65 Stat. 75, 86:

Section 6 (j) [50 U. S. C. App. 456 (j)] — 2

Section 12 (a) [50 U. S. C. App. 462 (a)] — 4

220609—54

In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 390

CLAIR LAVERNE WHITE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Appeals (2 R. 61–74) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on September 14, 1954 (2 R. 75). The petition for a writ of certiorari was filed on October 6, 1954. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1). See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether the classification of petitioner by the selective service system as available for

noncombatant service was without basis in fact.

2. Whether the court below erred in affirming the action of the trial judge who, pursuant to examination of F. B. I. reports *in camera*, denied admission of the reports in evidence.

STATUTE INVOLVED

Universal Military Training and Service Act, 62 Stat. 604, 612, 622; 65 Stat. 75, 86:

> Section 6 (j) [50 U. S. C. App. 456 (j)]:
>
> Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code. Any person claiming exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the armed forces under this title, be assigned to noncombatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be ordered by his local board,

subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4 (b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate * * *. Any person claiming exemption from combatant training and service because of such conscientious objections shall, if such claim is not sustained by the local board, be entitled to an appeal to the appropriate appeal board. Upon the filing of such appeal, the appeal board shall refer any such claim to the Department of Justice for inquiry and hearing. The Department of Justice, after appropriate inquiry, shall hold a hearing with respect to the character and good faith of the objections of the person concerned, and such person shall be notified of the time and place of such hearing. The Department of Justice shall, after such hearing, if the objections are found to be sustained, recommend to the appeal board that (1) if the objector is inducted into the armed forces under this title, he shall be assigned to noncombatant service as defined by the President, or (2) if the objector is found to be conscientiously opposed to participation in such noncombatant service, he shall in lieu of such induction be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4 (b) such civilian

work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate * * *. If after such hearing the Department of Justice finds that his objections are not sustained, it shall recommend to the appeal board that such objections be not sustained. The appeal board shall, in making its decision, give consideration to, but shall not be bound to follow, the recommendation of the Department of Justice together with the record on appeal from the local board. * * *

Section 12 (a) [50 U. S. C. App. 462 (a)]:

Any * * * person * * * who * * * refuses * * * service in the armed forces * * * or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this title, or rules, regulations, or directions made pursuant to this title * * * shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment * * *.

STATEMENT

Petitioner seeks review of a judgment of the Court of Appeals for the Ninth Circuit (2 R. 75), affirming the judgment of the District Court for the Southern District of California finding him guilty of violating the Universal Military Train-

ing and Service Act by refusing on July 18, 1952, to be inducted into the armed forces, and imposing a sentence of four years' imprisonment (1 R. 23, 27–28).

Petitioner's record with the selective service system may be summarized as follows:

On July 14, 1949, petitioner, who was then age 18, registered under the selective service laws, indicating as his occupation, "press operator" in the North Hollywood Tool and Die Manufacturing Co. in Hollywood, California (Gov. Ex. 1, p. 1).[1] On November 9, 1950, he filed his questionnaire, stating, *inter alia*, that he was a minister of Jehovah's Witnesses but "I do not regularly serve as a minister" (Gov. Ex. 1, p. 7). He left the space relative to ordination blank. He stated, further, that he worked 48 hours per week as a "punch press operator and set-up man" for the North Hollywood Tool and Die Manufacturing Co. where he had worked since April 15, 1949, receiving pay at the rate of $1.20 per hour; that he expected to continue indefinitely in this work; that he previously had been employed as a spray painter; and that his education had stopped after high school (Gov. Ex. 1, pp. 8–10). Petitioner signed the space in which conscientious objectors indicate their claim to such status (Gov. Ex. 1, p. 11). He also claimed physical exemption on the basis that he suffered from hay fever, receiv-

[1] Petitioner's selective service file is lodged with the Court as Government Exhibit No. 1.

ing "medical aid" for this from a drugstore (Gov. Ex. 1, p. 11).[2] He left blank the space in which he was to indicate what he considered his proper classification (Gov. Ex. 1, p. 11).

In his special form for conscientious objectors, filed on November 20, 1950 (Gov. Ex. 1, pp. 15–20), petitioner stated that he was opposed to participation in both combatant and noncombatant service, that he believed in the use of force under no circumstances, and that he gave expression to his views "at every opportunity publicy [sic] and in the homes" (Gov. Ex. 1, pp. 15–16). He stated that his employer was the North Hollywood Tool and Die Manufacturing Co. where he continued to work as a punch press operator (Gov. Ex. 1, p. 16). He explained that his father and mother were Jehovah's Witnesses, that he had become a member in 1941 (when he was ten years of age) by immersion, that he attended a Kingdom Hall in San Fernando, California, and that (Gov. Ex. 1, p. 19) "We obey the laws of the land only as long as they do not conflict with gods [sic] laws." On January 15, 1951, petitioner was classified 1–A–O by unanimous vote of his local board, as eligible for induction for noncombatant duties only (Gov. Ex. 1, p. 12). On January 18, 1951, petitioner requested a hearing to show that he was entitled to 4–E (predecessor of 1–O) status (Gov.

[2] On his subsequent physical examination no clinical record of hay fever was found by medical authorities (Gov. Ex. 1, p. 55).

Ex. 1, pp. 12, 23). On January 29, 1951, petitioner appeared before his local board. The minutes of the board contain the following notation (Gov. Ex. 1, p. 22):

> CLAIRE LAVERNE WHITE 4 82 31 272, appeared before the Local Board for a personal appearance. Folks went into Jehovahs Witness religion around 1930. Registrant was baptized into religion 1941. Employer is North Hollywood Tool & Die Manufacturing Co. Make parts for Douglas Air Craft, also North American. Steel Priority # 1. Board feels employment status such as to indicate remaining in 1-Ao classification, after careful review of file.

A notation in the file also states (Gov. Ex. 1, p. 12):

> Employer engaged in defense work—Case not reopened—Continued 1-A-O.

Petitioner was again classified 1-A-O (Gov. Ex. 7, pp. 12, 24).

On February 2, 1951, petitioner's mother wrote a letter to the local board stating in essence that petitioner was a Bible student who attended Theocratic Ministry School once a week, that he spent his "spare time" in religious activity (the nature not described), and (Gov. Ex. 1, pp. 25-27) "It would be in direct conflict to his consciences [sic] to engage in any form of worldly conflict."

On February 5, 1951, petitioner wrote his local board with reference to appealing his case (Gov. Ex. 1, pp. 28-30). In this letter he stated that

teachings of his religion required him to "obey God rather than men," and keep "unspotted from this world." He stated "I am neutral in these conflicts between nations," and "Jehovah's Witnesses are a world wide organization and to go to war would mean killing our own brothers."

On March 1, 1951, petitioner forwarded to his local board various letters vouching for his sincerity and stating that he was an active participant in a congregation of Jehovah's Witnesses (Gov. Ex. 1, pp. 32–36).

On March 19, 1951, petitioner's selective service file was forwarded to his appeal board, which on April 11, 1951, made a tentative finding that he was not entitled to 4–E (predecessor of 1–O) status (Gov. Ex. 1, p. 12).

Petitioner appeared before a hearing officer for the Department of Justice on March 6, 1952. At the time of the hearing, petitioner was a tree trimmer but it is noted in the report that "from 1949 to 1951 he worked on war contracts." The report notes that he went to church two or three times a week, that it was petitioner's position that he "would not assist in any material way, but only spiritually in case of necessity" (Gov. Ex. 1, p. 42), and concluded (*ibid.*, p. 43):

> There is no question in my mind but that the registrant is sincere, but from all of the evidence I would recommend that he be placed in noncombatant service, or 1–A–O.[3]

[3] At the trial petitioner testified that he attended the hearing with his father (2 R. 38) and that he was questioned

This recommendation was forwarded by the Department of Justice to the appeal board on April 11, 1952 (Gov. Ex. 1, p. 44), and on May 19, 1952, he was again classified 1–A–O by unanimous vote of that body (Gov. Ex. 1, p. 12).

On May 27, 1952, petitioner attempted to appeal the decision to the President, and in a letter set forth that he was studying for the ministry (Gov. Ex. 1, p. 45). On June 3, 1952, he was notified by his local board that no further appeal was available to him inasmuch as his classification by the appeal board had been by unanimous vote (Gov. Ex. 1, p. 46).

On June 24, 1952, petitioner was ordered to report for induction on July 7, 1952 (Gov. Ex. 1, p. 47). About June 27, 1952, petitioner visited his local board and told its clerk that he was traveling east and would be back about July 14th or 15th. He was told that he could not do this as he was under order to report for induction and could only make a trip in case of death or serious illness in his family. He thereupon told the clerk that his grandmother was quite ill and that this was "partly the reason for this trip." He was

about such things as the length of time he had been a member of the Jehovah's Witnesses faith, and his beliefs (2 R. 39). He testified that he told the hearing officer that he could not do any work of material importance, even to milking a cow or feeding a soldier's wife because (2 R. 40) "that was not as important as doing the preaching work we were commanded to do." (There is no evidence of record that petitioner did any preaching.)

told to submit a letter from his grandmother's physician to this effect. He told the clerk that he did not intend to submit to induction anyhow and so it did not make much difference whether he reported or not. He indicated he intended to go on the trip in any event and would report on his return. (Gov. Ex. 1, p. 47.)

On July 7, 1952, petitioner failed to report for induction as orderd. On July 11, 1952, he was notified by his local board to report to it in five days or be declared delinquent (Gov. Ex. 1, pp. 12, 49). On July 14, 1952, his local board ordered him to report at the induction station on July 18, 1952 (Gov. Ex. 1, p. 49A). On the latter date petitioner appeared but refused to submit to induction as charged in the indictment (Gov. Ex. 1, pp. 12, 52).

At the time of his hearing before the Department of Justice hearing officer, petitioner was told that there was no material adverse to his claim in the F. B. I. report (2 R. 40–41). There is no mention of any F. B. I. material in the Department of Justice report (2 R. 44). On the trial of the case, petitioner subpoenaed the F. B. I. report contending that it should be made part of the selective service file available for inspection to detect undisclosed derogatory information (1 R. 15–16; 2 R. 3–22). The government moved to quash the subpoena on the ground that no adverse material was shown to exist, that the contents of the F. B. I. records were irrelevant to the Depart-

ment of Justice recommendation, and that no foundation was laid to support their production. The trial court examined the F. B. I. reports *in camera* and ruled that their evidentiary value to defendant was so slight as not to outweigh the general public interest in the preservation of the confidential character of executive documents (2 R. 47).[4]

DISCUSSION

1. This is a companion case to *Tomlinson* v. *United States*, No. 391 this Term, in that the selective service boards upheld petitioner's claim to exemption from combatant service while rejecting his claim for exemption from noncombatant service. It differs from *Tomlinson*, however, in that the record shows that registrant here worked as a punch press operator in a war plant which made parts for aircraft during a period of military activity in Korea. This fact, not explained by registrant, provides specific factual support, separate and apart from adherence to the tenets of his faith for the board's rejection of his claim of exemption from noncombatant service. As the court below stated (2 R. 65):

> In view of his experiencing no difficulty working upon the manufacture of munitions for war, the board was not without justification in concluding that White had no conscientious objection to participation

[4] These sealed F. B. I. reports (Def's. Exs. A, B, and C) have been lodged with this Court as part of the record.

in war through the manufacture of arms and munitions, just so long as he did so for a private company and not for the government. It was therefore but natural for the boards to believe that if the registrant's conscience was not bothered while working on war contracts he could not justly claim he was conscientiously opposed to noncombatant participation in war activities and that his mere objection to wearing a uniform because it marked him as one working for the government was not the kind of objection contemplated by the statute. Objection to serving a country, even on religious grounds, is not the standard under the statute.

In short, as the court below held, petitioner demonstrated by his conduct that he was not conscientiously opposed to work which directly furthered the prosecution of war. This ruling is not, as contended by petitioner (Pet. 14), in conflict with the decision of the Court of Appeals for the Seventh Circuit in *United States* v. *Wilson*, 215 F. 2d 443. There the court held that a record of employment as a railroad telegraph operator did not provide a basis in fact for the action of the National Selective Service Board in classifying registrant as available for *combatant* service after the local board and the appeal board by unanimous vote had each placed him in classification 1–O (conscientious objector exempt from both combatant and noncombatant service). Here, by

contrast, the boards upheld petitioner's claim to classification as one conscientiously opposed to killing. His war work was considered as evidence only that he was not conscientiously opposed to work not including killing which directly supported the army in the field.

This case is different from those now before the Court[8] in that it involves a 1–A–O classification (conscientious objector available for noncombatant military service only) and differs from *Tomlinson* in that the 1–A–O classification rests on an explicit factual basis separate and apart from petitioner's beliefs as a Jehovah's Witness. However, the common element of opposition by Jehovah's Witnesses on religious grounds to any military service, which caused us to suggest that it would be appropriate to defer action on the *Tomlinson* petition until the other cases are decided, is also present and requires the same recommendation here.

2. In this case, as in *Tomlinson,* petitioner contends that the trial court erred in refusing to permit him to inspect the F. B. I. reports which were before the Department of Justice hearing officer. As in *Tomlinson,* the trial court made an *in camera* investigation of the reports and found their evidentiary value to petitioner to be so slight as not to warrant their disclosure, considering

[8] *Sicurella* v. *United States*, No. 250; *Simmons* v. *United States*, No. 251; *Gonzales* v. *United States*, No. 69; *Witmer* v. *United States*, No. 164.

the public interest in the preservation of their confidential character (2 R. 47–48).

The considerations discussed in our memorandum in *Tomlinson* are applicable to this case as well. While we think the court below was correct in upholding the action of the trial court, this Court's decision in *Simmons*, No. 251, may have a bearing on the issue here presented. We are obliged, therefore, to suggest for this further reason that action on this petition be deferred until the Court has decided *Simmons*.

CONCLUSION

The decision below is correct on the facts and not in conflict with any decisions of other courts of appeals. Inasmuch, however, as it involves issues the determination of which may be affected by this Court's decisions in other cases now pending before it, it is suggested that it would be appropriate for the Court to defer action on this petition until the pending cases are decided.

Respectfully submitted.

SIMON E. SOBELOFF,
Solicitor General.
WARREN OLNEY III,
Assistant Attorney General.
BEATRICE ROSENBERG,
J. F. BISHOP,
Attorneys.

NOVEMBER 1954.

U. S. GOVERNMENT PRINTING OFFICE: 1954

INDEX

Cases Cited

	PAGE
Franks v. United States No. 11,114, 9th Cir., Oct. 4, 1954, — F. 2d —	2, 4
Goetz v. United States No. 14,185, 9th Cir., Oct. 14, 1954, — F. 2d —	2, 4
Gonzales v. United States No. 69, October Term, 1954	1
Sicurella v. United States No. 250, October Term, 1954	1
Simmons v. United States No. 251, October Term, 1954	2
Tomlinson v. United States No. 391, October Term, 1954	2, 3
United States v. Packer 2d Cir., 1952, 200 F. 2d 540, 346 U. S. 1 (1953) ..	4
Witmer v. United States No. 164, October Term, 1954	1, 2

Supreme Court of the United States

OCTOBER TERM, 1954

No. 390

CLAIR LAVERNE WHITE,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY
TO MEMORANDUM FOR THE UNITED STATES

MAY IT PLEASE THE COURT:

I.

It is suggested by respondent that this Court ought to defer consideration of the petition for writ of certiorari in this case until after this Court has decided *Gonzales* v. *United States,* No. 69, October Term, 1954; *Witmer* v. *United States,* No. 164, October Term, 1954; *Sicurella* v.

United States, No. 250, October Term, 1954; and *Simmons* v. *United States,* No. 251, October Term, 1954. This suggestion of the respondent is not a good one.

There is an outstanding distinction between this case and the *Simmons* case. The court below decided that there was basis in fact for the denial of the conscientious objector status, because White had a personal appearance and was continued in Class I-A-O after such appearance. This point has been argued under point I in the Reply to Memorandum for the United States in the companion case of *Tomlinson* v. *United States,* No. 391, October Term, 1954. What is said there applies here.

The court below found that there was basis in fact for the denial of the full conscientious objector classification and the granting of the noncombatant military classification, because White had worked as a punch-press operator in a war plant that made parts for aircraft during the military activity in Korea. On this point the respondent quotes extensively from the opinion of the court below.

The Court has before it a similar question in *Witmer* v. *United States,* No. 164, October Term, 1954, but the decision to be made in the *Witmer* case will not control the decision by the court below in this case. The court below has made an artificial distinction between relevancy of civilian war work by a conscientious objector to the I-A classification and to the I-A-O classification. The court below has held in subsequent cases that the performance of war work is entirely irrelevant and immaterial to the I-A classification. (See *Franks* v. *United States,* No. 14,114, 9th Cir., Oct. 4, 1954, — F. 2d — ; and *Goetz* v. *United States,* No. 14,185, 9th Cir., Oct. 14, 1954, — F. 2d — .) The court below has held that the performance of civilian war work is not basis in fact for the I-A classification but that it is for the I-A-O classification. This is a distinction without a difference and an unreasonable interpretation of the law that will continue to stand as the law for all the

states within the jurisdiction of the court below. Defendants in criminal prosecutions that have been classified I-A-O (conscientious objectors willing to do noncombatant military service) will continue to be faced with the rule of the court below that the performance of civilian war work is basis in fact for that classification, notwithstanding the undisputed evidence showing in their files before the draft boards that they were conscientiously opposed to such noncombatant military service.

Since the decision by the court below on this point will not be affected by the decision that this Court will make in the other cases, the petition for writ of certiorari in this case ought to be granted and the case set down for oral argument along with the other pending cases.

It is much better for this Court to decide all of these related problems in one sweep. It would conserve the time and effort of the Court to have this case brought in for review and the case set down for argument along with the others. If this is not done the remaining problems that will be undecided by the other cases will have to be determined by this Court at a later date. The importance of the questions presented demands that the Court settle them at the same time it decides the other cases. To put off the day of judgment in this case would merely continue the confusion in the law, caused by the court below, as to the performance of civilian war work as basis in fact for the denial of the full conscientious objector classification when the board has ordered the registrant to do noncombatant military service.

II.

The respondent argues that denial of the use of the FBI report at the trial is harmless error because the hearing officer stated that he told White there was no material adverse to his claim in the FBI report. This has been answered in point 7 of the *Tomlinson* Reply to Memoran-

dum for the United States, where the quotation is made from the case of *United States* v. *Packer*, 2d Cir., 1952, 200 F. 2d 540 (reversed on other grounds, 346 U. S. 1 (1953)).

III.

The position taken by the respondent, that the performance of war work in a civilian plant is equivalent to willingness to do noncombatant military service, ignores reality. It defies the undisputed evidence here that White was conscientiously opposed to both combatant and noncombatant military service. The law on which this case should be determined is not based on logic or reason being made manifest in the conscientious objector claim, but on justice and fair play. While it might not seem reasonable to others, it was reasonable to White that he was willing to do civilian war work but unwilling to perform noncombatant military service. The law does not permit the draft boards or the courts to sit in judgment on the reasonableness of such conclusion. The only question the boards and the courts have to determine is whether White opposed noncombatant military service, based on religious training and beliefs. He established this fact by undisputed evidence. Even the Department of Justice found him to be sincere in his opposition to such service but it arbitrarily recommended that he be ordered to do military service because of his willingness to work in a war plant. This was no basis in fact even for the I-A-O classification. There is definite inconsistency, therefore, between the opinion of the court below in this case and its opinions in the cases of *Franks* v. *United States*, No. 14,114, Oct. 4, 1954, — F. 2d —, and *Goetz* v. *United States*, No. 14,185, Oct. 14, 1954, — F. 2d —.

CONCLUSION

This Court ought to grant the petition for writ of certiorari. To defer the granting of the petition until the other

cases are decided merely puts off the day of judgment. Since this Court will be called upon some time in the future to pass upon the question (and it must pass upon it in order to settle the law for the district courts in the states under the jurisdiction of the Ninth Circuit), it would be much better to hear all these cases together. It will do no good to determine all these questions piecemeal. It is just as well for conservation of time that this case be determined along with the other cases. To that end the petition for writ of certiorari should be granted now.

Respectfully submitted,

HAYDEN C. COVINGTON

Counsel for Petitioner

November, 1954.